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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1004

AIR DISPATCH, INC., *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF APPELLANT AIR FREIGHT FORWARDERS ASSOCIATION IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellant hereby answers both the Motion to Affirm filed by The National Association of Motor Bus Owners, *et al.* and the Motion to Affirm filed by the United States and the Interstate Commerce Commission.

I

The ICC's Motion Ignores the Agency Action Underlying This Appeal

This case arose out of the effort of the Civil Aeronautics Board to extend the benefits of air transportation of property beyond the 25-mile area within which it has been confined since World War II. This Court can judicially notice the explosion of population and commerce beyond a rigid 25-mile radius of airport cities. Industries located beyond the 25-mile pale are today denied the benefits of integrated air-ground transportation provided by direct air carriers and indirect air carriers (air freight forwarders).

The CAB proposed an expansion of terminal pick-up and delivery areas to 50 miles and even farther around New York and Chicago, in recognition of the modern spread of commerce and industry. The ICC, at the instance of its regulated motor trucking industry, opposed this expansion. The CAB capitulated to the ICC and withdrew its proposed expansion. It ceded to the ICC *final* determination of the scope of services which may be offered by *air* carriers.[1]

The United States and ICC's Motion to Affirm claims these events never occurred. It asserts,

> "The Commission's rules establish no new policy, but are generally a codification of principles established in prior adjudicatory proceedings." (pp. 4-5)

Contrary to the ICC's assertion, there has *never* been an adjudicatory proceeding, before either the CAB or ICC, which held that the ICC was the final arbiter

[1] "Air Carriers" include both airlines (direct air carriers) and air freight forwarders (indirect air carriers).

of "air transportation" as defined in the Federal Aviation Act or that the ICC could and would overrule a CAB determination of the proper scope of pick-up and delivery service by *air-carriers*—and the ICC cites none.

The ICC-CAB agreement, subject of the litigation below, *does* establish a new policy. It is a dramatic reversal of roles theretofore adopted: the ICC had never overruled, or asserted its power to overrule and supersede a CAB determination of the scope of an air carrier terminal area. The new rules give the ICC that power.

The ICC's Motion to Affirm also incorrectly states,

> "The asserted potential conflict or overlap between the ICC and CAB regulatory jurisdictions has not occurred and may never occur." (p. 5.)

The conflict has occurred. It is the subject of this litigation. The CAB proposed an expansion of air carrier terminal areas. The ICC vetoed the expansion. It matters not that the conflict was "resolved" by informal processes rather than formal adjudication. The result is the same and it did happen.

The ICC says that, under the ICC-CAB agreement, future conflict will not be likely to arise. This may well be true but only because the CAB has abdicated to the ICC. There may be no conflict only because the CAB has surrendered in its effort to break the bonds confining air transportation to narrow rings around airport cities.

The fact that there is peace between the agencies itself is the strongest reason for this Court to act. Only by telling the CAB that it has the statutory responsi-

bility and duty to define air transportation, and that it cannot cede this statutory authority to the ICC, will air transportation be expanded to accord with modern economic needs—and only then will each agency be remitted to its proper statutory function.

II

The United States and ICC Appear to Doubt the Propriety of the Decision of the Court Below

The Court below held that the ICC had single and complete jurisdiction to define the scope of air service terminal areas. It said,

> "We find that the ICC has the jurisdiction to define the scope of the exemption granted in Section 203(b)(7a)."

The United States and ICC apparently do not want to defend this flat holding here. They concede that,

> "The CAB also has jurisdiction over surface transportation that is performed in connection with air transportation." (Motion to Affirm, p. 5.)

The United States and the ICC, in their Motion to Affirm, do not squarely face and defend the Court's unequivocal holding that the ICC has final authority on this question. They claim that Congress placed "*initial* authority to define the excepted area in the Commission" (p. 7). They contend that the CAB agrees that "the Commission has *primary* responsibility for defining the scope of the exemption" (p. 7).

These statements reverse what really happened. The ICC-CAB agreement placed "*initial* authority" in the CAB, *subject to ICC veto*. The agreement gave the CAB "*primary* responsibility" to accept or reject air carrier tariffs, subject to *final* determination by the ICC.

The significance of this effort to reverse the actual allocation of agency responsibility and authority cannot be overstated. It constitutes an implicit recognition of the vital weakness of the ICC-CAB agreement and the error of the decision of the Court below in sustaining it.

III

The Justification for the Decision Below Is Weak and Unconvincing

The Court below held that the ICC had final jurisdiction to determine when motor transportation is air transportation within air carrier terminal service areas on the sole basis that this determination "must logically fall on the Commission" because the Commission has authority to regulate the rest of motor transportation and also has safety and hours-of-work regulatory authority even within air terminal service areas. Nowhere in the Court's opinion is there any indication that it made a thorough and searching analysis of the purpose and intent of the Federal Aviation Act and the Interstate Commerce Act, which the Court has held is the proper basis for determining such questions. See *Pan American Airways* v. *U.S.*, 371 U.S. 296 (1963).

The Motion to Affirm filed by the United States and ICC makes no reference to Congress' purpose and intent in creating a new agency, the Civil Aeronautics Authority (now the Civil Aeronautics Board), to foster and develop air transportation. The appellees are content to assert that "it was natural" to vest this authority in the Commission (p. 7).

There is nothing in either logic or nature which supports the inference that when Congress expressly rejected early bills giving the ICC authority over air

transportation, and instead, committed regulation to a new and independent agency, it intended that the ICC should hold a veto over the CAB's determination of the scope of air transportation. Rather, the creation of a new agency, the definition of "air transportation" to include commerce "partly by aircraft and partly by other forms of transportation," and the express exclusion of ICC economic regulation from "transportation of persons or property by motor vehicle when incidental to transportation by aircraft," evidence a clear Congressional intent that the infant air transportation industry, with such a vast potential, should not be entrusted to a hostile guardian.

The Civil Aeronautics Act represented a studied Congressional decision to assign the development of air transportation to an agency with a deep understanding of the present and future needs of *air* transportation. Neither "logic" nor "nature" justifies subjecting the expansion of air transportation terminal service areas to an agency alien to its interests and hostile to its needs, that is, to the ICC; and the CAB's acquiescence in this perversion of Congressional intent only emphasizes, and cannot cure, the wrong.

The ICC, and the Intervenors, try to explain away the fact that the Federal Aviation Act alone defines transportation as partly by air and partly by surface; and the fact that the Interstate Commerce Act gives the ICC no jurisdiction over any movement by air. The flaw in this undertaking is emphasized by the fact that the ICC and the Intervenors offer *different* rationalizations for these unyielding statutory provisions.

The ICC claims the definitions "were added to prescribe the scope of Federal regulation of intrastate

movements" (p. 8, n. 4). The Intervenors say the definition in the Interstate Commerce Act was "simply to make clear" that motor carriers are to be regulated under Part II of the Interstate Commerce Act even when joining with rail, water or express companies (pp. 4-5).

Neither of these explanations is acceptable. Neither has support in the legislative history. The Intervenors' explanation is contrary to Section 202(c) of the Interstate Commerce Act, 49 U.S.C. 302(c), which provides that when transportation is performed by motor vehicle by a railroad or water carrier "incidental to transportation or service subject to [Chapters 1 and 12, respectively], in the performance within terminal areas of transfer, collection, or delivery services," such transportation:

> "*shall be considered to be and shall be regulated as transportation subject to Chapter 1* of this title when performed by such carrier by railroad, *as transportation subject to Chapter 12* of this title when performed by such water carrier . . ." [Italics supplied.]

A similar provision appears in Part III of the Interstate Commerce Act regulating water carriers: Section 303(f), 49 U.S.C. § 903(f). When transportation by water is provided for a regulated railroad, motor carrier, or water carrier "within terminal areas of transfer, collection, or delivery service,"

> "such transportation *shall be considered to be performed* by such carrier or express company *as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such* services are incidental." [Italics supplied.]

Thus, Intervenors are wrong in stating that Section 203(a)(10) means that when motor carriers join with rail or water carriers or express companies "they are to be regulated under Part II and not under any other part of the Interstate Commerce Act" (p. 5). Rather, the Interstate Commerce Act evinces a scheme in harmony with Appellants' interpretation that Congress intended the CAB to have exclusive economic regulatory jurisdiction over motor carriage incidential to air transportation. *The above-quoted sections show that terminal area services incidental to another mode of transportation are to be considered "as part of and shall be regulated in the same manner" as the dominant mode.*

While Congress did not use this precise form of words at the time of enactment of the Civil Aeronautics Act of 1938, the words it did use are just as clear. It vested the CAB with jurisdiction over "air transportation," defined as commerce "partly by aircraft and partly by other forms of transportation." It removed from ICC jurisdiction "transportation of persons or property by motor vehicle when incidental to transportation by aircraft."

The use of the same words "incidental to" which appear in Sections 202(c) and 903(b) of the Interstate Commerce Act are no accident. They are used to carry out the same allocation of regulatory jurisdiction over terminal area operations by one mode of transportation for another mode: *the regulator of the dominant mode has exclusive economic regulatory jurisdiction over the operations of the mode performing "incidental" terminal area collection and delivery services.*

The United States and ICC claim that if appellants are correct, "it would be difficult to understand" why section 203(b) of the Interstate Commerce Act gives the ICC jurisdiction over safety regulation of motor carriers within the incidental to air zone (p. 8). There is no more difficulty in understanding why the ICC has jurisdiction over safety of motor carrier operation subject to CAB *economic* regulation than in understanding why the SEC has regulatory jurisdiction over security offerings by such carriers or why the FTC has antitrust jurisdiction over these same operations.

The concurrence of jurisdiction over *different* aspects of the activities by the same operators presents no difficulty. It certainly does not support the conclusion that because the ICC has safety jurisdiction it must also have economic jurisdiction. In fact, it does not. The Motion of the United States and ICC so concedes, as it must, since there is no quarrel with the plain statutory exemption from ICC *economic* regulation of the incidental-to-air terminal service areas. The United States and ICC state:

> "The Commission has no authority to impose economic regulations on exempted carriage." (p. 6.)

There are clearly numerous other operations under Section 203(b) such as motor vehicles operated by a cooperative association and motor vehicles used in newspaper distribution (subsections 5 and 7) which are expressly exempted from ICC *economic* control (and which are in fact under the *economic* control of no agency) but which are assigned to the ICC for

safety regulation. The ICC manifestly cannot find that plain statutory language "difficult to understand."

The real and only issue is not *whether* the CAB has exclusive jurisdiction over the incidental-to-air zones once these are determined; it unquestionably does. *The issue is which agency, the ICC or CAB, shall determine the reach of "air transportation," that is, to determine the limits of incidental-to-air transportation.*

The Motions of the United States and ICC and of the Intervenors raise additional arguments which only beg this question. The reference in both motions to a joint CAB-ICC board which may regulate joint rates and services is such an argument.[2] These statutory provisions, Section 1003 of the Federal Aviation Act, provide for regulation of through service and joint rates between ICC-regulated surface carriers and CAB-regulated direct air carriers.[3] To note that there can be through service by ICC-regulated surface carriers and CAB-regulated direct air carriers has no relation to the question here presented of which agency shall define the scope of CAB-regulated carriage.

Joint rates and through service, treated in Section 1003, are very different from the integrated service offered by *air* carriers, direct and indirect, at issue in the instant appeal. Joint service assumes truly ICC-regulated surface interstate commerce, on the one hand, and truly CAB regulated air commerce, on the other hand, which are combined with a single rate offered to

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[2] U.S.-ICC Motion, pp. 9-10; Intervenors Motion, pp. 5-6.

[3] Section 1003 of the Federal Aviation Act expressly prohibits joint rates between indirect air carriers (air freight forwarders) and ICC-regulated surface carriers.

the customer, and a division of the revenues by the carriers, with each retaining carrier its separate identity as air transportation and surface transportation, respectively.

The service at issue in this appeal is provided solely by *air* carriers *under an airwaybill covering the entire movement.* The incidental-to-air portion of the haul is controled by the air carrier, is geared to its schedules, *and is a part of the total air movement.* To say that the CAB alone exercises economic regulatory jurisdiction over air carrier terminal services does not make "nonsense" of Section 1003 as urged by the United States and ICC (p. 9). Nor does it "ignore" or "render meaningless" that Section as contended by the Intervenors (pp. 5-6). Section 1003 simply has nothing to do with the issue on appeal. It provides for a different kind of transportation service.

Indeed, the Intervenor Appellees concede this point at the end of their Motion. They agree with Appellants that the Court below erred in relying on a joint board, created under Section 1003 of the Federal Aviation Act, as a means of resolving the conflict in agency jurisdiction here at issue. They state that the Court's statement "reflects a misreading of that Section," conceding that,

> "Whether the participants in through service have the requisite authority to perform transportation is a matter for independent determination, by the Board in the case of air transportation and by the Commission in the case of surface transportation" (p. 14, n. 5).

Similarly, the argument that Section 402(a)(7) of the Interstate Commerce Act, which provides for

separate regulation by the ICC of surface forwarder activities and excludes from the ICC's regulation that part of forwarding which uses an air carrier or an incidental-to-air motor carrier, only begs and throws no light on, the question which is the subject of appeal. To note that the ICC may regulate surface forwarding and may not regulate air forwarding is patently in no way inconsistent with the conclusion that the CAB, and the CAB alone, may determine the proper scope of air forwarding.

Finally, it should be noted that the Intervenors fundamentally misstate Appellants' argument. It is *not* Appellants' theory that "the Interstate Commerce Commission has no economic regulatory authority over any transportation by motor vehicle rendered in connection with transportation by air." (p. 4).

Appellants do not claim that all transportation by motor vehicle "in connection with" transportation by air is subject to the CAB. There are many movements which go beyond the airport terminal service areas. Those surface movements are subject to the economic regulation of the ICC.

Appellants claim only that those surface movements within the air service terminal areas, *i.e.*, those movements which are "incidental to transportation by aircraft," are excluded from ICC regulation, and the determination of what is "incidental to transportation by aircraft" is committed to the agency with special knowledge and experience in that field, the CAB.

IV

The ICC's Jurisdiction in Certification Cases Is Irrelevant to the Issues on Appeal

The Motions to Affirm make much of the fact that ICC is presented with and decides applications for certificates of public convenience and necessity which require it to determine whether the applicant is or is not operating exclusively within the incidental-to-air exclusion of Section 203(b)(7a). Both Motions cite the recent case of *Wycoff Company, Inc.* v. *United States and Interstate Commerce Commission,* D.C.D. Utah 1965, which affirmed the Commission's denial of a certificate to a motor carrier found to be not exempt under Section 203(b)(7a).

The *Wycoff* case, and the numerous ICC cases deciding certification issues, cited by Appellees and Intervenors, are beside the point at issue here. Those cases involve applications by *surface* carriers for certificate authority. It is not only appropriate, but necessary, that the ICC determine whether they are entitled to such authority.

The instant case does not involve surface carriers. It involves *air carriers.* Appellants are all air carriers duly authorized by the CAB to perform air transportation.

Appellants are here urging this Court to affirm the CAB's exclusive authority and duty to define the scope of *air carriers'* service in *air transportation* as defined by the *Federal Aviation Act.*

Nothing involved in this case will derogate from the ICC's authority to continue deciding certification ap-

plications of *surface carriers* performing *surface transportation* as defined by the *Interstate Commerce Act.*

Conflict between the two agencies arises only, as it has arisen here, when the ICC attempts to overrule a decision by the CAB as to the scope of air transportation provided by air carriers. If the CAB determines that an air carrier is providing air transportation within a bona fide air service terminal area, and the ICC believes the CAB has improperly defined the scope of the air service terminal, the ICC may appeal the decision to the courts. So may any aggrieved motor carrier.

Under the present arrangement, the ICC may simply overrule the CAB. This it should not be able to do. The development of air transportation has been set back 25 years by confining air service terminal areas to their pre-World War II definition. This Court should deny the Motions to Affirm and grant plenary consideration of these important issues.

Respectfully submitted,

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